

IN THE MISSOURI SUPREME COURT

No. SC86104

UNITED PHARMACAL COMPANY OF MISSOURI, INC.

Respondent,

vs.

MISSOURI BOARD OF PHARMACY,

Appellant.

**Appeal from the Buchanan County Circuit Court
The Honorable Weldon C. Judah**

APPELLANT'S SUBSTITUTE BRIEF AND APPENDIX

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a standard of conduct that has the force of law,”– in that it is merely a staff interpretation provided to the public for their information, and it does not grant, remove, nor otherwise affect any right that anyone has, nor has it been nor will it be a basis for action by the Board with regard to United Pharmacal or any other person. 18

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JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the Circuit Court of Buchanan County granting summary judgment in an action for declaratory judgment. This appeal does not involve any of the categories reserved for the exclusive jurisdiction of the Supreme Court of Missouri. Therefore, jurisdiction existed in the Missouri Court of Appeals, Western District. Art. 5, §3, Missouri Constitution.

The Supreme Court now has jurisdiction pursuant to its order transferring this matter after the opinion of the Court of Appeals. Art. 5, §10, Missouri Constitution.

STATEMENT OF FACTS

Like many agencies, the Missouri Board of Pharmacy has a website, where the Board's staff disburses information to the public. (L.F. 51, 183). Sometime after January 2001, Board staff updated a portion of the Board's website devoted to answering questions frequently asked of staff – the “FAQs,” or “frequently asked questions” portion of the site. (L.F. 12-13, 21, 51, 183). The staff posed, and answered, a hypothetical question regarding the sale of veterinary legend drugs:

8. Does an entity have to be licensed as a pharmacy to sell veterinary legend drugs to the consumer /owner of the animal(s)?

Yes. Veterinary legend drugs may only be sold based on the order/prescription of a veterinarian. An entity may not sell veterinary legend drugs directly to the consumer (owner of animal) based on a prescription without being licensed as a pharmacy.

(L.F. 51). The Board itself did not approve the statement. (L.F. 52). The statement reflected the staff's understanding of the position the Board took in a particular circuit court case and the staff's interpretation of statute. (L.F. 52).

United Pharmacal Company of Missouri, Inc. (“United Pharmacal”) sells “veterinary legend” drugs to owners of animals, upon the prescription of a veterinarian. (L.F. 11). On June 21, 2001, the Board of Pharmacy issued a cease and desist warning to United Pharmacal, stating that United Pharmacal's practices violate quoted statutory provisions defining the practice of pharmacy and requiring a license for such practice. (L.F. 40-41) (A4-A6).

United Pharmacal initially sought to comply with the statutory provisions. (L.F. 67). Then, on January 11, 2002, United Pharmacal filed a petition in the Buchanan County Circuit Court seeking declaratory judgment. (L.F. 8-15). The declaratory judgment request sought to resolve the controversy as to whether United Pharmacal must be licensed as a pharmacy and employ a licensed pharmacist. (L.F. 14). As authority for its suit, United Pharmacal cited §536.050, RSMo 2000 (A13-A14), which provides for declaratory judgments respecting the validity of rules. (L.F. 10). To bring the matter in Buchanan County, home of United Pharmacal's business office, United Pharmacal invoked the special venue provision of § 536.050 (L.F. 9).

On February 11, 2002, the Board filed a motion to dismiss. (L.F. 16-17). On April 4, 2002, the Board filed an amended motion to dismiss on jurisdictional and venue grounds. (L.F. 18-19). The Board argued that §536.050 did not properly apply because no rule was at issue. (L.F.18-19). On May 21, 2002, the Court elected to treat the Board's amended motion as a motion for summary judgment and requested the Board file a new motion for summary judgment. (L.F. 3).

On June 17, 2002, the Board filed a motion to dismiss, or in the alternative for summary determination. (L.F. 35-42). Again, the Board argued that §536.050 was an improper basis for action, and further argued that the legislature amended §338.210.1, RSMo (A11-A12) in August of 2001, mooting Plaintiff's request for a declaratory judgment. (L.F. 35-42). On August 28, 2002, United Pharmacal filed a response to the Board's motion and a separate cross-motion for summary judgment. (L.F. 43-154, 174-202).

Throughout its pleadings, United Pharmacal alleged that jurisdiction existed in Buchanan County pursuant to §536.050 because of the existence of an alleged unpromulgated rule. (L.F. 12-14, 21-22, 174-202). The “rule” that United Pharmacal challenged was the question and answer posed by staff in the “FAQ” portion of the Board’s website. (L.F. 12-13, 21, 51, 183).

On November 1, 2002, the circuit court granted United Pharmacal summary judgment. (L.F. 213-215) (A1-A3). The court held that the veterinary drug “FAQ” was an unpromulgated rule, the court possessed jurisdiction pursuant to §536.050 to address unpromulgated rules, the Board could not retrospectively apply the 2001 amendment of § 338.210.1, and that at the time of the cease and desist letter Chapter 338 did not grant the Board the power to regulate veterinary drugs. (L.F. 213-215).

On December 9, 2002, the Board filed a timely notice of appeal. (L.F. 216-222).

POINTS RELIED ON

I.

The circuit court was an improper venue, and thus it erred in exercising jurisdiction, because the statute plaintiff invoked, §536.050, which permits only suits for “declaratory judgments respecting the validity of rules” to be brought “in the county of the plaintiff’s residence, or if the plaintiff is a corporation . . . having a . . . business office in this state, in the county of such . . . business office,” did not apply so as to set venue in Buchanan County, in that the controversy that formed the basis of the declaratory judgment action did not turn on the validity or threatened application of an administrative rule, but rather on statutory provisions.

Golden Rule Ins. Co. v. Missouri Dep’t of Ins.,

56 S.W.3d 471 (Mo. App. W.D. 2001)

State ex rel. Mo. Dep’t of Conservation v. Judges of the Circuit Court of Reynolds County,

91 S.W.3d 602 (Mo. banc 2002)

Missouri Soybean Ass’n v. Missouri Clean Water Comm’n,

102 S.W.3d 10 (Mo. banc 2003)

Group Health Plan, Inc., v. State Board of Registration,

787 S.W.2d 745 (Mo. App. E.D. 1990)

Section 536.050, RSMo 2000

II.

The circuit court erred in finding that the non-binding, interpretative statement on the Board's website was a rule because it is not a rule as described in *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 23 (Mo. banc 2003) – *i.e.*, it does not “establish[] a standard of conduct that has the force of law,” – in that it is merely a staff interpretation provided to the public for their information, and it does not grant, remove, nor otherwise affect any right that anyone has, nor has it been nor will it be a basis for action by the Board with regard to United Pharmacal or any other person.

Baugus v. Director of Revenue,

878 S.W.2d 39 (Mo. banc 1994)

Missouri Soybean Ass'n v. Missouri Clean Water Comm'n,

102 S.W.3d 10 (Mo. banc 2003)

Missouri Nat'l Educ. Ass'n v. Missouri State Bd. of Educ.,

34 S.W.3d 266 (Mo. App. W.D. 2001)

Section 536.010(4), RSMo 2000

III.

The circuit court erred in declaring United Pharmacal's rights without addressing the current language of § 338.210.1 because any declaration of United Pharmacal's rights is moot if it doesn't address United Pharmacal's prospective entitlement to sell veterinary drugs.

Missouri Soybean Ass'n v. Missouri Clean Water Comm'n,

102 S.W.3d 10, 23 (Mo. banc 2003)

Northgate Apartments, L.P. v. City of North Kansas City,

45 S.W.3d 475 (Mo. App. W.D. 2001)

Section 338.210.1, RSMo Supp. 2002

STANDARD OF REVIEW

The Board of Pharmacy appeals from an order of the circuit court granting United Pharmacal summary judgment on its petition for declaratory judgment. The propriety of summary judgment is purely an issue of law. *McDermott v. Missouri Bd. of Probation and Parole*, 61 S.W.3d 246, 247 (Mo. banc 2001). The appellate court does not defer to the trial court's judgment granting summary judgment; review is de novo. *Id.*; *Letsinger v. Drury College*, 68 S.W.3d 408, 410 (Mo. banc 2002).

ARGUMENT

I.

The circuit court was an improper venue, and thus it erred in exercising jurisdiction, because the statute plaintiff invoked, §536.050, which permits only suits for “declaratory judgments respecting the validity of rules” to be brought “in the county of the plaintiff’s residence, or if the plaintiff is a corporation . . . having a . . . business office in this state, in the county of such . . . business office,” did not apply so as to set venue in Buchanan County, in that the controversy that formed the basis of the declaratory judgment action did not turn on the validity or threatened application of an administrative rule, but rather on statutory provisions.

Normally, a suit against an agency such as the Board of Pharmacy must be brought in Cole County. *See, e.g., State ex rel. Missouri Dep’t of Conservation v. Judges of the Circuit Court of Reynolds County*, 91 S.W.3d 602, 603 (Mo. banc 2002); *State ex rel. Department of Natural Resources v. Roper*, 824 S.W.2d 901, 903 (Mo. banc 1992)(*Roper*). There are, however, “special” venue rules that permit suits to be brought elsewhere. *See Roper* at 903 n. 2.

United Pharmacal invokes one such “special” rule, found in § 536.050, RSMo 2000 (A13-A14). That statute applies solely to suits for “declaratory judgments respecting the validity of rules, or of threatened application thereof.” *Id.* Such suits may be brought “in the county of the plaintiff’s residence, or if the plaintiff is a corporation . . . having a . . . business office in this state, in the county of such . . . business office.” *Id.*

This case raises what appears to be a question of first impression: can a party invoke the special venue provision of § 536.050 to seek what is necessarily a declaratory judgment as to the meaning of a statute, based on the premise that a statement by agency staff interpreting that statute should have been promulgated as a rule. The answer to that question should be, “No.”

The dispute between the Board and United Pharmacal began not with a rule – promulgated or not – but when in June 2001 the Board issued a cease and desist warning to United Pharmacal. (L.F. 40-42)(A4-A6). The warning alerted United Pharmacal that its operations violated specific statutory provisions; §§ 338.010.1(A7), 338.220 (A8-A9) and 338.195(A10), RSMo 2000. The warning did not allege that United Pharmacal violated any rules. Pursuant to *Group Health Plan, Inc., v. State Board of Registration*, 787 S.W.2d 745, 449 (Mo. App. E.D. 1990), the Board’s threatened application of statute entitled United Pharmacal to maintain a standard declaratory judgment action. *See also, Farm Bureau Town and Country Ins. Co. of Missouri v. Angoff*, 909 S.W.2d 348, 354 (Mo. banc 1995). But again, venue for such action would lie only in Cole County.

The special rule in § 536.050 applies only if an agency’s administrative rules, not statutes, are at issue. The controversy in this case relates principally to a statutorily defined term, the “practice of pharmacy.” This term is not defined by rule, nor did the Board resort to any agency rule in making its determination. The Board’s only basis for its cease and desist warning was the statute. And declaring whether United Pharmacal can sell veterinary drugs without a pharmacy license is dependent solely on the statute. That United Pharmacal included an allegation regarding the status of a “FAQ” cannot transform this case into something other

than what it really is.

In other words, the only controversy between United Pharmacal and the Board – and there must be a controversy between the parties in a declaratory judgment suit *Levinson v. State*, 104 S.W.3d 409, 411 (Mo. banc 2003), *Missouri Soybean Ass’n v. Missouri Clean Water Comm’n*, 102 S.W.3d 10, 25 (Mo. banc 2003) – was over the meaning of the statute, not the validity of the “FAQ” as a rule that no one has ever contemplated enforcing. And a declaratory judgment as to the meaning of a statute is simply not a “declaratory judgments respecting the validity of rules.”

This case is similar to one faced by the Missouri Court of Appeals, Western District, in which that court explained that when a regulatory agency was applying a statute, a person adversely affected could not invoke § 536.050 to obtain jurisdiction. *Golden Rule Ins. Co. v. Missouri Dep’t of Ins.*, 56 S.W.3d 471, 474 (Mo. App. W.D. 2001). The dispute in *Golden Rule* involved the terms “managed care plan” and “health indemnity plan,” each of which was defined by statute. Based on the statutory definitions, the Department of Insurance advised Golden Rule that a particular rider form constituted a “managed care plan.” Golden Rule filed its declaratory relief petition under §536.050. The court ruled that §536.050 could not provide a basis for subject matter jurisdiction:

A managed care plan, and a health indemnity plan are both defined by statute, not the agency rules. §§376.1350(23) and (24). The Department did not resort to the agency’s rules in making a determination as to which statutory provision was applicable to the rider form. The case presented

to the trial court demonstrated that the Department did not threaten Golden Rule with the application of the agency's administrative rules, nor did it rely on an administrative rule as its basis for rejecting the rider form. Instead, the record shows that the Department's rejection of Golden Rule's policy rider was based on its determination that the rider fell within the definition of a "managed care plan," as defined by §376.1350(24).

Id. at 474-475.

Here, as in *Golden Rule*, a regulatory agency took action based on a statute, not based on any rule, promulgated or not. No court can answer whether United Pharmacal must be licensed as a pharmacy by looking at regulations. It is the statute that determines whether United Pharmacal must be licensed and hire a pharmacist. In fact, United Pharmacal's obligation to comply with statutes exists independent of any action of the Board.

The emptiness of United Pharmacal's venue claim is demonstrated by the insignificance, to it, of the relief it could obtain under § 536.050. Suppose for the moment that the Board had made a procedural error in promulgating the "FAQ" as a rule, and United Pharmacal sought and obtained a declaratory judgment saying that the rule is invalid. United Pharmacal would still be subject to the statute. And because the statute was the only basis for the cease and desist order, United Pharmacal would have obtained no meaningful relief. That the "FAQ" was not promulgated as a rule at all makes no difference. The "FAQ" can be thrown out, but the basis for the cease and desist order – the statute – remains.

The alternative, of course, is to grossly enlarge the scope of § 536.050. If United Pharmacal is right, and all someone has to do to assert venue outside Cole County is claim that an agency interpretation of statute should have been formally promulgated as a rule, why wouldn't every challenge to agency action contain such an allegation? But the statute does not contemplate such breadth. When, as here, the real question before the circuit court is statutory interpretation, the matter falls outside the limited scope of § 536.050.

II.

The circuit court erred in finding that the non-binding, interpretative statement on the Board's website was a rule because it is not a rule as described in *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 23 (Mo. banc 2003) – i.e., it does not “establish[] a standard of conduct that has the force of law,”– in that it is merely a staff interpretation provided to the public for their information, and it does not grant, remove, nor otherwise affect any right that anyone has, nor has it been nor will it be a basis for action by the Board with regard to United Pharmacal or any other person.

United Pharmacal's entire case is based on the premise that non-binding, interpretative statements placed by staff on a Board website in an effort to help Missouri citizens, constitute rules. They do not.

Like many – perhaps all – state agencies, the Board of Pharmacy maintains a website through which it attempts to assist Missouri businesses involved in pharmacy business, and Missouri citizens who purchase pharmaceuticals. Websites have become a key component in the efforts of state agencies to serve the public, both businesses and private citizens. Among the common features of such websites are statements that paraphrase, clarify, and adapt statutes and rules to make them intelligible to the public and helpful to those seeking to understand how they interact with a particular agency and how they are affected by the statutes that pertain to and the regulations promulgated by that agency. They are the latest equivalent of an agency employee responding to an inquiry when someone walks in the office door or

calls on the telephone.

Sometime after January of 2001, Board staff updated a portion of the Board's website devoted to answering questions frequently asked of staff—the "FAQs", or "frequently asked questions" portion of the site. The staff added language posing, and answering, a hypothetical question regarding the sale of veterinary drugs. The staff member answering the question construed §§ 338.010.1(A7), 338.220(A8-A9), and 338.195(A10), RSMo 2000, to bring sales of veterinary legend drugs within the scope of the Board's licensing authority:

8. Does an entity have to be licensed as a pharmacy to sell veterinary legend drugs to the consumer/owner of the animal(s)?

Yes. Veterinary legend drugs may only be sold based on the order/prescription of a veterinarian. An entity may not sell veterinary legend drugs directly to the consumer (owner of animal) based on a prescription without being licensed as a pharmacy.

(L.F. 13)

The circuit court found that FAQ 8 was not promulgated in accordance with Section 536.021, RSMo 2000. That is certainly correct. But the FAQ is not a rule.

Section 536.010(4), RSMo 2000, defines a rule as an "agency statement of general applicability that implements, interprets, or prescribes law or policy." But, not every generally applicable statement or announcement of intent by a state agency is a rule. *Baugus v. Director of Revenue*, 878 S.W.2d 39, 42 (Mo. banc 1994), *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 23 (Mo. banc 2003). In *Missouri Soybean*, this court held

that a rule “establishes a standard of conduct that has the force of law.” *Missouri Soybean* at 23. As reasoned by the Court, to be a “rule,” there has to be some reason to believe that the standard will actually be applied:

By its definition, a rule must be of “general applicability.” Section 536.010(4).

Implicit in this concept is that something – the purported “rule” – will be applied to some as yet unnamed, unspecific group of people.

Such is not the case here. The list will not be used or applied to the appellants in any future proceeding to determine whether or not they have violated a norm embodied in that list.

Id.

The FAQ on the Board’s website is not a rule. It does not have the force and effect of law. The FAQ does not purport to bind any individual or entity. The FAQ was meant to be informative, not to impact any right of an individual. It will not be used or applied as a standard of conduct by which United Pharmacal’s conduct will be measured nor does it compel action on the part of United Pharmacal. It creates no legal duty on the part of United Pharmacal.

The FAQ is similar to the statement at issue in another case decided by the Missouri Court of Appeals, *Missouri Nat’l Educ. Ass’n v. Missouri State Bd. of Educ.*, 34 S.W.3d 266 (Mo. App. W.D. 2001). That case involved the State Board of Education’s acts in granting exemptions from a requirement that school districts expend a defined percentage of costs on staff compensation. The challenged statement was a written list of reasons that school districts had advanced in the past in support of successful exemption requests. The Department of

Elementary and Secondary Education (DESE), which serves as the State Board's staff, had compiled the list and presented it to the State Board. The Court upheld the circuit court's finding that the guidelines did not constitute a rule. *Id* at 287. The Court noted that the State Board did not vote on the guidelines, and no evidence was presented that the State Board followed or applied the guidelines in deciding to grant the exemptions. *Id*.

Like the State Board in MNEA, the Board of Pharmacy did not approve the FAQ and there is no evidence that the Board followed or applied the FAQ in its decision to send United Pharmacal a cease and desist letter.

The FAQ was not meant to place an obligation on any individual, apart from their pre-existing obligation to comply with statutory provisions. (L.F. 70). The FAQ was added to the website by the staff in an effort to provide information, not as an effort to bind any individual.

It was nothing more than an effort to provide interpretive assistance. Websites are not, of course, the only means by which agencies provide interpretive assistance. Employees answer phone calls, respond to letters, and speak with those who ask questions at agency facilities or in the field. They may write newsletters, appear on television or radio, and use other means of mass communication to assist the public in understanding the agency's role.

No agency has, can, or should bar its employees from offering such interpretive advice, whether it is given one-on-one or in a more widely distributed form, such as a posting on a website. Nor have, can, or should employees giving interpretive advice, even in a public forum, be limited to quoting statutory and regulatory language or using words officially approved by a governing Board. Such a step—even if it were somehow practical—would severely handicap

employees efforts to provide the best service to Missouri citizens.

The circuit court's decision cripples the ability of a state agency's staff to inform interested individuals as to the staff's understanding about how general conduct may fit under current statutory guidelines. Under the circuit court's decision, the staff is advised not to alert interested individuals as to their understanding of a statute's effect, but to proceed directly to legal action to herald its understanding of the statute.

III.

The circuit court erred in declaring United Pharmacal's rights without addressing the current language of § 338.210.1 because any declaration of United Pharmacal's rights is moot if it doesn't address United Pharmacal's prospective entitlement to sell veterinary drugs.

The sole cause of action in United Pharmacal's petition was a request for declaratory judgment. The purpose of a declaratory judgment action is to resolve a presently existing controversy regarding the prospective rights and duties of a party so as to avoid litigation. *Northgate Apartments, L.P. v. City of North Kansas City*, 45 S.W.3d 475, 478-479 (Mo. App. W.D. 2001). United Pharmacal asked the court to declare whether United Pharmacal could continue to sell veterinary legend drugs, or must it cease. The Buchanan County Circuit Court did not answer that question.

The Buchanan County Circuit Court did not declare the prospective rights of United Pharmacal, but instead only decided the rights of United Pharmacal at a point in the past; the time of the cease and desist warning issued on June 21, 2001. The court misunderstood the purpose of declaratory judgment. This is evident by the fact that the court chastised the Board for suggesting that the most current statute be considered, calling the amended statute an "after-the-fact change in the law"¹:

¹After the Board issued its cease and desist warning, the General Assembly amended a statute not cited in the cease and desist warning, but impacting the issue of what constitutes

Defendant further asserts that the revisions of Section 338.210 RSMo resulting

the practice of pharmacy. Section 338.210.1 was amended to state:

1. Pharmacy refers to any location where the practice of pharmacy occurs or such activities are offered or provided by a pharmacist or another acting under the supervision and authority of a pharmacist, including every premises or other place:

- (1) Where the practice of pharmacy is offered or conducted;
- (2) Where drugs, chemicals, medicines, prescriptions, or poisons are compounded, prepared, dispensed or sold or offered for sale at retail;
- (3) Where the words “pharmacist”, “apothecary”, “drugstore”, “drugs”, and any other symbols, words or phrases of similar meaning or understanding are used in any form to advertise retail products or services;
- (4) Where patient records or other information is maintained for the purpose of engaging or offering to engage in the practice of pharmacy or to comply with any relevant laws regulating the acquisition, possession, handling, transfer, sale or destruction of drugs, chemicals, medicines, prescriptions or poisons.

Section 338.210.1, RSMo Supp. 2002. (A11-A12).

from the 2001 amendments thereto serve to clear up any confusion as to the conduct of Plaintiff now being prohibitedThis Court does not find persuasive the argument that as an after-the-fact change in the law . . . might appear to justify the position the Defendant now takes, as opposed to that it took prior to the change in the law or which was not cited as the basis for the change in policy, respectively, that, therefore, Plaintiff is disentitled to relief. “Article I, Sec. 13 of the Missouri Constitution generally prohibits retrospective application of laws enacted by the legislature.” Kampe v. Howard Stark Professional Pharmacy, Inc., 841 S.W.2d 223, 226 (W.D., 1992)

(L.F. 219)(A2).

But any presently existing controversy between the Board and United Pharmacal must be resolved based on the statutes as they read, not as they once read. A declaratory judgment is to remedy a *current* controversy so as to avoid *future* litigation. *Northgate* at 478-479. The circuit court did not attempt to answer any current controversy. It did not address United Pharmacal’s rights after the amendment. The circuit court’s action therefore does not serve to avoid future litigation.

The ineffectiveness of the Judge’s order is emphasized by his own statements during the motion hearing:

. . . But the declaratory and injunctive relief presumably deals with this fact specific Cease and Desist order.

The law has changed. Whether it means what Mr. Hylton says it means

or it means what you say it means. I must admit, and I think you will all agree there isn't any construction authority, there isn't anything that says it does mean dogs or it doesn't mean dogs. The 2001 law, that is. What is to prevent the attorney general, should your client obtain the relief that he is seeking under the petition from beginning day one and commencing under their interpretation of 338.210 issuing another Cease and Desist Order based on the exact conduct they say was occurring back in 2000 and 2001, and avail your client nothing?

(Tr. 25)

My concern is whether your client were to prevail on this petition or not, I am uncertain as to the status he would be placed in respecting attempts by the State of Missouri to enforce the existing 338.210.

If I did set aside, hold for not, the earlier entered order I certainly cannot tell them how to go about enforcing what is unquestionably, depending upon their perspective, a validly existing law right now. Because we are dealing with two different laws.

(Tr. 26-27)

A declaratory judgment should have a conclusive effect and lay to rest the parties' controversy. *Missouri Soybean Ass'n v. Missouri Clean Water Comm'n*, 102 S.W.3d 10, 25 (Mo. banc 2003). A declaratory judgment must accomplish a useful purpose. *Id.* The decision issued by the Circuit Court at best issues a moot declaration of past law. Alternatively, the Circuit Court does not render declaratory judgment at all, but instead renders a judicial review

of the cease and desist warning. Each action is inconsistent with the purpose of declaratory judgment.

CONCLUSION

For the reasons stated above, the judgment of the Circuit Court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned assistant attorney general hereby certifies that:

- (1) That the attached brief complies with the limitations contained in Special Rule 1(b) of this Court in that it contains 4,557 words, as determined by WordPerfect software; and
- (2) That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
- (3) That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 13th day of September, 2004, to:

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